

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BENJAMIN AGOITIA
Claimant

VS.

IFH GROUP, INC.
Respondent

AND

EMC INSURANCE CO.
Insurance Carrier

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Docket No. 256,192

ORDER

Respondent and its insurance carrier appealed the August 23, 2000 preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore.

ISSUES

Claimant alleges that he injured his neck as the result of a series of repetitive mini-traumas that he allegedly sustained while working for respondent as a welder. Claimant initially believed that he continued to perform his welding duties through approximately April 4, 2000, but the present record indicates that he welded through approximately April 11, 2000.

After conducting a preliminary hearing and after reviewing the depositions of Howard White and Deanna Swysgood, Judge Moore determined that claimant had injured his neck at work. The Judge also found that claimant had provided respondent with timely notice of that injury as claimant had "just cause," which extended the notice period to 75 days from the date of accident.

Respondent and its insurance carrier contend that Judge Moore erred. They argue that claimant did not injure himself while working for respondent. They also argue that claimant failed to provide respondent with timely notice of the injury.

The only issues before the Board on this appeal are:

1. Did claimant sustain personal injury by accident arising out of and in the course of employment with respondent?
2. Did claimant provide respondent with timely notice of the accident?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Appeals Board finds:

1. The preliminary hearing Order should be affirmed. The Appeals Board adopts the detailed findings and conclusions set forth by the Judge in the preliminary hearing Order.
2. The Appeals Board affirms the Judge's finding that claimant injured his neck while working for respondent. The greater weight of the evidence proves that it is more probably true than not that claimant's neck injury occurred as the result of flipping his welding hood down by rapidly flexing and extending his neck. Even claimant's direct supervisor, Howard White, indicated in his testimony that he was concerned that welders could sustain neck injuries lowering their welding helmets by quickly moving their necks. Mr. White testified, in part:

I don't believe that there's . . . [a] company policy as to how you perform your job but it has always been my personal advice to use your hand in order to lower your helmet for the mere reason of neck injuries and I have left here several days with a sore neck for the same reason.¹

3. The Board also affirms the Judge's conclusion that claimant had just cause to extend the time for providing respondent with notice of the injury.² Initially, claimant and his chiropractors were unsure of the cause of claimant's symptoms. But claimant and his doctors relayed to respondent their suspicions that claimant's symptoms were related to work. On May 8, 2000, Dr. Tony A. Wilbeck's office faxed documents to claimant's direct supervisor, Howard White, that included a letter stating claimant's condition was, at least in part, related to his work as a welder. Therefore, as of May 8, 2000, respondent had notice of claimant's neck injury and its possible relationship to work.

The record is not entirely clear, but respondent may have had notice even before May 8, 2000, that claimant's neck complaints were related to his work. As claimant last performed welding activities on or about April 11, 2000, claimant provided respondent with notice of the accidental injury within 75 days of performing the injurious activity of rapidly flexing his neck.

¹ Deposition of Howard White, July 31, 2000; p. 22.

² See K.S.A. 44-520.

4. Because claimant has proven that he injured himself while working for respondent and that he provided respondent with timely notice, the request for preliminary hearing benefits should be granted.

5. As provided by the Workers Compensation Act, preliminary hearing findings are not binding but subject to modification upon a full hearing of the claim.³

WHEREFORE, the Appeals Board affirms the August 23, 2000 preliminary hearing Order entered by Judge Moore.

IT IS SO ORDERED.

Dated this ____ day of October 2000.

BOARD MEMBER

c: Scott J. Mann, Hutchinson, KS
James M. McVay, Great Bend, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director

³ K.S.A. 1999 Supp. 44-534a(a)(2).